No. 87-1809

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

LARRY A. HOFFMAN,
Petitioner,

vs.

GLIDDEN COATINGS & RESINS
DIVISION OF SCM CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Is summary judgment proper where the issue presented below and here is whether an employer has retaliated against an employee in violation of Title VII, 704(a) which employee was protecting the rights of a female whose rights were protected by Title VII of the Civil Rights Act of 1964 42 U.S.C. §2000(e), where the employer can be charged with knowledge that it is retaliating unlawfully despite the employee's lack of an exact statement to the employer accusing the employer of the unlawful discrimination?

PARTIES BELOW

Parties before the United States Court of Appeals for the Sixth Circuit were Larry A. Hoffman as Appellant and Glidden Coatings & Resins Division of SCM Corporation as Appellee.

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No. _____

IN THE

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OPINIONS BELOW

No opinion was rendered by the Sixth Circuit Court of Appeals. The order of the Court of Appeals not yet reported, appears in the appendix hereto.

The opinion of the United States District Court for the Northern District of Ohio, Western Division, not yet reported, as well as the report of and recommendation of the referee, also appear in the appendix hereto.

JURISDICTIONAL STATEMENT

Petitioner, Larry A. Hoffman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 5, 1988. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS

The full text of the following statutory provisions appears in the appendix hereto:

Title VII Section 704(a), 42 U.S.C. §2000e-3(a).

STATEMENT OF THE CASE

This is a case of retaliatory discharge in violation of Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000 *et seq*). On or about December 20, 1983, respondent, Glidden Coatings and Resins, Division of SCM Corporation discharged the petitioner, Larry Hoffman, from his employ due to his attempts to have his daughter, Lisa Hoffman, treated as an equal to men in the employer's plant.

On or about January 3, 1984, petitioner initially filed his written complaint of the retaliatory discharge with the Equal Employment Opportunity Commission (hereinafter, EEOC). On or about January 17, 1984, petitioner filed his written complaint of the retaliatory discharge with the Ohio Civil Rights Commission (hereinafter, OCRC). Thereafter, on or about March 30, 1984, the charge filed with the OCRC was withdrawn wherein the EEOC was to have full jurisdiction of the petitioner's claim of a retaliatory discharge.

On or after June 4, 1984, the EEOC notified petitioner of his right to institute this action within ninety days of the receipt of the notification. Petitioner did so institute further action in regard to this matter by filing his claim in the United States District Court for the Northern District of Ohio, Western Division on July 24, 1984.

On or about October 21, 1986, the respondent filed a Motion for Summary Judgment which was granted by Magistrate James G. Carr through his Report and Recommendation filed January 14, 1987. The Report and Recommendation of Magistrate of James G. Carr was adopted by Judge Walinski on or about February 25, 1987, over and above the objections filed by the petitioner on January 23, 1987.

From the Opinion and Order of the lower court, the petitioner did file his Appeal with the United States Court of Appeals for the Sixth Circuit, which court affirmed the decision and order of the District Court.

REASONS FOR GRANTING THE WRIT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment should not have been granted against Larry Hoffman. Larry Hoffman created a genuine issue of material fact pursuant to Federal Rule of Civil Procedure 56(C) and thus should not have had his case dismissed by Magistrate Carr by his Order dated January 14, 1987. In ruling on a Motion for Summary Judgment, "the Court must construe the evidence in its most favorable light in favor of the party opposing the Motion and against the movant." *Bohn Aluminum and Brass Corporation v. Storm King Corporation*, 303 F.2d 425, at 427 (6th Circuit 1962). Further, as is well established precedent, the non-moving party is entitled to all reasonable inferences that may be drawn in his favor. *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 90 S. Ct. 1598 (1970). As such, the comments made by Larry Hoffman, to the effect he had contacted "management" concerning his belief that men were being treated preferentially to women must and can only be viewed in favor of plaintiff's contentions that management knew they were retaliating against petitioner in violation of 42 U.S.C. §2000e-3(a).

The petitioner is relying upon well settled law concerning summary judgment. Judge Walinski in the District Court relied on the case of *Bouldis v. U.S. Suzuki Motor Corporation*, 711 F.2d 1319, 1324 (6th Cir. 1983). As *Bouldis* states, it is well established that Larry Hoffman, the petitioner, should have had the facts viewed in a light most favorable to him. In determining whether summary judgment should be granted or not, *Watkins v. Northern Ohio Pulers Association, Inc.*, 673 F.2d 1155, at 1158 (6th Cir. 1980), stated "the movants papers are to be closely scrutinized while those of the

opponent are to be viewed indulgently." It is quite clear from this quote of the *Watkins* case that summary judgment in no way should have been granted to the respondent.

Of import here is that there is a question of fact which the trier of fact must determine. That is, whether management was or was not aware of Larry Hoffman's thoughts and beliefs that his daughter, Lisa, a female, was not being treated on an equal footing with men. The law makes it unlawful for an employer to retaliate against one who is protecting the rights of a female, which female the employee believes is being discriminated against. Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-z). The law also indicates that the thoughts of discrimination must be communicated to the employer, and the employee must be engaged in protected activity. *Holcolm v. Owens-Illinois, Inc.*, 793 F.2d 745 (6th Cir. 1986). There was sufficient evidence presented of both the activity of attempting to see that a female, albeit his daughter, is treated equally with men and his communication of this to management, to produce a question for the trier of fact.

Further, it strongly contended that management's knowledge of claimed illegal activities is a question for the trier of fact. Title VII Section 704(a), as set out in the Appendix does not state that an employee must expressly tell his employer that the employer is practicing discrimination as has been the respondent's interpretation. The "opposition clause" as it is called discusses an employee's opposition to an employer's practice. It does not state that the employee must specifically tell the employer that the employer's actions are unlawful. To interpret *Holcolm* and Title VII Section 704(a) to mean that an employee must tell his employer

that employer is discriminating would be a statement by this Court allowing employers to (1) discriminate and (2) discharge someone in retaliation. The purpose of the statute and this Court, as well as all the courts of this country, is to protect people against discrimination. The respondent wants this Court to rule against the petitioner on a technicality that he was not and could not be aware of to protect his job. Title VII Section 704(a) must be read to allow petitioner to be protected from retaliation of the respondent when they were well aware of why he was complaining of their practices but didn't come out and directly say to them "you are discriminating against my daughter because she's a female." This Court must allow certiorari and hear this case fully to protect the rights given under 1964 Civil Rights Act.

Respectfully submitted,

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APPENDIX

MAGISTRATE'S REPORT AND RECOMMENDATION IN THE UNITED STATES DISTRICT COURT

(Dated January 14, 1987)

C 84-7624

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

LARRY HOFFMAN,
Plaintiff,

v.

GLIDDEN COATINGS AND RESINS,
DIV'N OF SCM CORPORATION,
Defendant.

MAGISTRATE'S REPORT AND RECOMMENDATION

This is an employment discrimination case in which the parties have consented to entry of judgment by the undersigned. Pending is a motion by the defendant for summary judgment, which is decisional. Upon a review of the motion, the plaintiff's response and the defendant's reply, and the exhibits attached thereto, I conclude, for the reasons which follow, that the plaintiff has failed to established a prima facie case. The defendant's motion shall, therefore, be granted.

The gravamen of the plaintiff's lawsuit is that he was fired because he was active on behalf of his daughter's efforts to secure and maintain full-time employment with the defendant. Those efforts, according to him, were frustrated because the company discriminated against the daughter on the unlawful basis of her gender. This led him, according to his complaint and deposition, to seek redress on her behalf to remedy the ill effects of the company's unlawful discriminatory practices. That activity, he claims, in turn caused the company to fire him in retaliation for asserting his daughter's rights under Title VII.

All pertinent matters regarding the defendant's motion for summary judgment are not in dispute. The plaintiff was fired, and to some extent, his efforts on behalf of his daughter was factor which motivated the decision to terminate him (along with other factors, according to the company). But it is also undisputed that the plaintiff never told the company that his efforts to secure and maintain employment for his daughter were motivated by his belief that the company's decision were based on the fact that the daughter was female. At most, he "thought" that such was the case. But he never stated so, even indirectly or obliquely. Nor is there any other indication in the record that he said or did anything which could reasonably be perceived as having been likely to call the company's attention to his concerns about the allegedly discriminatory treatment being meted out upon his child. Even if such were the case (and an earlier decision of this Court has resolved that issue against the daughter, and, implicitly, the plaintiff here), no claim for retaliation can be based upon a position which was never communicated or otherwise made known to the company.

Most simply put, one cannot retaliate against that of which he is unaware. Absent such awareness, there can be no animus, and without animus, there cannot be any unlawful response. Thus, the better view, and the one which appears to have been adopted generally, and which I adopt expressly, is that, a showing that "the employer was aware of his employee's protected activities . . . lays the crucial groundwork for the plaintiff's ultimate burden of showing by a preponderance of the evidence a causal connection between the employer's action and [his] own: obviously, an employer cannot be motivated by something he has never heard of, and the cases have indeed so held." 3 Larson, Employment Discrimination 17-116, -119 (1986) (footnotes omitted).

A4

OPINION AND ORDER OF THE DISTRICT COURT

(Dated February 25, 1987)

No. C 84-7624

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

LARRY HOFFMAN,
Plaintiff,

vs.

GLIDDEN COATINGS & RESINS,
Defendant.

OPINION AND ORDER

This cause came to be heard on plaintiff's objections to the Report and Recommendation of the United States Magistrate. In accordance with *Hill v. Duriron*, 656 F.2d 1208 (6th Cir. 1981), and 28 U.S.C. §636 (b)(1)(B) and (C), this Court made a *de novo* determination of the Magistrate's findings to which the plaintiff objects. For the following reasons, plaintiff's objections are not well taken and the same are denied.

This is a retaliatory discharge action brought by Larry A. Holmes against Glidden Coatings & Resins pursuant to Title VII, 42 U.S.C. §2000e-3(a). Plaintiff alleges he was discharged in retaliation for objecting to defendant's alleged discriminatory discharge of his daughter. With regard to his daughter's discharge, this Court found no merit in her claim. *Lisa Hoffman v.*

Glidden Coatings & Resins, No. 84-7623 (N.D. Ohio July 10, 1986), *appeal docketed*, No. 86-3738 (6th Cir. Aug 11, 1986). In the case at bar, the Magistrate found that plaintiff failed to establish a prima facie case of retaliatory discharge and recommended defendant's motion for summary judgment be granted. Plaintiff objects to the Magistrate's Report and Recommendation.

The Magistrate found that plaintiff failed to convey to defendant his belief that the defendant had discriminated against his daughter, either directly or indirectly. Furthermore, the Magistrate determined that plaintiff failed to produce any evidence that could reasonably be perceived as having drawn defendant's attention to his belief. Since no claim for retaliation can be based upon a position which was never known to defendant, the Magistrate concluded that plaintiff failed to establish a prima facie case.

Plaintiff's sole objection is that the Magistrate misinterpreted plaintiff's Exhibit (C). Exhibit (C) is an excerpt from plaintiff's deposition in which he gave the following response; "No, but I thought she ought to have a fair opportunity to work same as men they're putting into filling." (Plaintiff's Depo. at 99). Plaintiff was next asked "Who did you talk to?" to which he answered, "Management." Plaintiff contends this indicates he had spoken to management regarding its alleged discrimination of a female.

It is well settled in considering a motion for summary judgment, facts are to be viewed in the light most favorable to the non-moving party. *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1324 (6th Cir. 1983). However, this Court is not compelled to view evidence out of context. The response on which plaintiff so heavily relies was given during a line of questioning concerning a

particular discussion with defendant's plant supervisor. After describing his attempt to prevent his daughter's layoff, plaintiff was asked, in relevant part, "why did you inject yourself into that?" (Plaintiff's Depo. at 98). It was in response to this question that plaintiff stated, "I thought she ought to have a fair opportunity to work same as men . . . ." Taken in the context of this line of questioning, the response clearly describes plaintiff's state of mind rather than a communication to defendant.

Upon further review of the record, this Court finds no evidence that plaintiff communicated his belief to defendant. Nor is there evidence which could reasonably be perceived as having drawn defendant's attention to this belief. The Magistrate's findings are consequently adopted by this Court.

It is therefore,

ORDERED that the plaintiff's objections to the Magistrate's Report and Recommendation of January 14, 1987 are found to be not well taken and the same are denied.

FURTHER ORDERED that the Magistrate's Report and Recommendation is adopted as the order of this Court.

FURTHER ORDERED that defendant's motion for summary judgment is granted.

FURTHER ORDERED that this case is dismissed.

NICHOLAS J. WALINSKI
SENIOR U. S. DISTRICT JUDGE

Toledo, Ohio
February 25, 1987

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Dated February 5, 1988)

No. 87-3262

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LARRY A. HOFFMAN,
Plaintiff-Appellant,

vs.

GLIDDEN COATINGS & RESINS,
DIVISION SCM CORPORATION,
Defendant-Appellee.

ORDER

BEFORE: LIVELY, *Chief Judge;* JONES and BOGGS, *Circuit Judges.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

IT IS ORDERED that the judgment of the District Court be, and it hereby is, AFFIRMED upon the opinion of the District Court.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, CLERK
/s/ JOHN P. HEHMAN

TITLE VII SECTION 704(a)

42 U.S.C. §2000e-3(a)

§2000e-3. Other unlawful employment practices

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§2000e-2000e-17].